Supreme Court, U.S.
FILED

97 • 264 AUG 7 1997

OFFICE OF THE CLERK

No. _____

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1997

WILLIAM M. FIORE, t/a
FIORE TRUCKING AND CONTRACTING,
Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Petition for Writ of Certiorari to the Supreme Court of Pennsylvania, Middle District, from the Order dated May 9, 1997, denying Appellant's Application for Reargument

James B. Lieber, Esquire
PA I.D. # 21748
Lieber & Hammer, P.C.
5528 Walnut Street
Pittsburgh, PA 15232-2312
(412) 687-2231

Counsel of Record
for Petitioner

41PP

QUESTIONS ON REVIEW

Questions presented for review:

1. Did the Appellate Courts of Pennsylvania deny Petitioner procedural due process by permitting the Commonwealth of Pennsylvania to assert a new theory of tax liability after the Commonwealth conceded, following the completion of administrative proceedings and during statutory appeal, the validity of Petitioner's original defense to the Commonwealth's theory of tax liability.

Answered in the affirmative.

2. Did the Commonwealth Court of Pennsylvania deny Petitioner procedural due process in not affording him adequate time or opportunity to prepare his defense to the Commonwealth's new theories of tax liability at a hearing upon remand from the

Pennsylvania Supreme Court.

Answered in the affirmative.

3. Did the Commonwealth Court of Pennsylvania deny Petitioner procedural due process in failing to create a record of evidence Petitioner offered during the evidentiary hearing on remand.

Answered in the affirmative.

TABLE OF CONTENTS

Page

Questions On Review i

Table of Contents iii

Table of Authorities v

Official And Unofficial Reports Of Opinions Delivered In the Case By Other Courts viii

Concise Statement Of Grounds On Which The Jurisdiction Of The Supreme Court Is Invoked ix

Constitutional Provisions At Issue x

Concise Statement Of The Case 1

Discussion 7

I. Petitioner's Due Process Rights Were Violated When The Commonwealth Of Pennsylvania Revised Its Theory Of Liability After 10 1/2 Years Of Litigation 8

A. The Commonwealth Of Pennsylvania Admitted The Validity Of The Petitioner's Defense 10

B. Pennsylvania Law Precludes Changing Theories Of Liability On Appeal 12

C. Due Process Would Bar Further Action By The State 16

II. Petitioner Was Denied Due Process When The Commonwealth Court Failed To Afford Him Adequate Access To His Records On Remand 22

III. Petitioner Was Denied Due Process When The Commonwealth Court Failed To Create A Record Of Documents Proffered By Petitioner 22

Conclusion 28

TABLE OF AUTHORITIES

Page

28 U.S.C. § 1257 iv

42 Pa.Con.Stat. § 564 28

Pa. R.A.P. 1571(h) 13, 14

Alexander v. Gardner-Denver Co., 415 U.S. 36, 58-59, 94 S.Ct. 1011, 1024 (1974) 25

Altman v. Ryan, 257 A.2d 583, 585 (Pa. 1969) 15

Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191 (1965) 8

Boddie v. Connecticut, 401 U.S. 371, 378, 91 S.Ct. 780, 786 (1971) 8

Carey v. Piphus, 435 U.S. 247, 261-262, 98 S.Ct. 1042, 1050 (1978) 8, 9

Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999 (1970) 25

DeMarco v. Jones & Laughlin Steel Corp., 522 A.2d 26 (Pa. 1987) 14

Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 398, 101 S.Ct. 2424 (1981) 18

Fiore v. Com. Bd. of Fin. and Rev., 633 A.2d 1112, 1113 (Pa. 1993) 22, 23

Fiore v. Commonwealth of Pennsylvania, 596 A.2d 1147 (Pa. Cmwlth. 1991) 4

Fiore v. Commonwealth of Pennsylvania, 633 A.2d 1111 (Pa. 1993) 4

Fiore v. Commonwealth of Pennsylvania, 668 A.2d 1210 (Pa. Cmwlth. 1995) 5

Gateway School Dist. v. Com. Dept. of Educ., 559 A.2d 118 (Pa.Cmwlth. 1989) 15

Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585 (1956) 24

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162, 71 S.Ct. 624 (1951) 7, 17, 21

Kimmel v. Somerset County Commissioners, 333 A.2d 777 (Pa. 1975) 15

Kindle v. Commonwealth State Board of Nurse Examiners, 515 A.2d 1342 (Pa. 1986) 14

Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 902 (1976) 8, 20

Memphis Light, Gas, & Water Division v. Craft, 436 U.S. 1, 14, 98 S.Ct. 1554 (1978) 26

Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593 (1972) 28

Pennsylvania State Police, Bureau of Liquor Enforcement v. Kelly's Bar, Inc., 639 A.2d 440 (Pa. 1994) 27, 28

Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1279-1295 (1975) 24

William M. Fiore t/a Fiore Trucking and Contracting v. Com. of Pa., No. 50.51 and 52 M.D. Appeal Docket 1992, at pages 22-28 and 45-49. . 6

William M. Fiore t/a/ Fiore Trucking and Contracting v. Com. of Pa., Nos. 83, 84 and 85 M.D. Appeal Docket 1996 7

Zinermon v. Burch, 494 U.S. 113, 125, 110 S.Ct. 975 (1990) 21

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

Fiore v. Commonwealth, 596 A.2d 1147 (Pa. Cmwlth. 1991)

Fiore v. Commonwealth, 609 A.2d 862 (Pa. Cmwlth. 1992)

Fiore v. Commonwealth, Board of Finance & Revenue, 633 A.2d 1111 (Pa. 1993)

Fiore v. Commonwealth, 668 A.2d 1210 (Pa. Cmwlth. 1995)

Fiore v. Commonwealth, 676 A.2d 723 (Pa. Cmwlth. 1996)

Fiore v. Commonwealth, Board of Finance & Revenue, 690 A.2d 234 (Pa. 1997)

CONCISE STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

This appeal relates to the entry of judgment of the Pennsylvania Supreme Court, dated March 25, 1997, at Nos. 83, 84 and 85 M.P. Appeal Docket 1996, by which the Court affirmed the Order entered April 22, 1996 in the Commonwealth Court at 925 C.D. 1980, 895 C.D. 1985, and 1029 C.D. 1985.

By Order dated May 9, 1997, the Pennsylvania Supreme Court denied Appellant's Application for Reargument.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AT ISSUE

All issues raised in this appeal invoke the due process protections provided by the Fourteenth Amendment of the United States Constitution which reads in relevant part as follows:

> Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONCISE STATEMENT OF THE CASE

The purpose of this petition is to seek redress where state courts flaunted due process in favor of a taxing authority in the unusual situation of a citizen who continued to challenge his major assessment while incarcerated. Instead of properly situating itself between the state and the individual, the judiciary allowed the government to offer an entirely new theory of assessment after 10 1/2 years, to hinder the incarcerated individual's access to his own files prior to the hearing, and finally to offer Petitioner a hearing (where he proceeded pro se) so deficient and perfunctory as to make it impossible to discern which documentary materials were entered into evidence, received into the record, or even considered by the court.

The controversy in this case revolves around two audits conducted by the Commonwealth of Pennsylvania, Department of Tax and Revenue, for the periods from

January 1, 1975 to September 30, 1978 and October 1, 1978 to December 31, 1981. These audits resulted in Appellant Fiore being assessed in excess of One Million Dollars ($1,000,000.00) for failure to pay sales and use tax on purchases made by Appellant in his trucking business which Appellant contended was tax exempt as a common carrier.

The Petitioner filed for Petition of Reassessment with the Board of Appeals of the Department of Revenue, asserting that no tax was due because the Petitioner was entitled to an exemption as a common carrier with public utility authority. The Board of Appeals found the assessment to be valid based on the theory that the Petitioner was not entitled to a common carrier exemption because he hauled for essentially one customer, United States Steel.

The Petitioner then exhausted the Department of Revenue administrative appeals process. The Board of

Finance and Review again denied the Petitioner's exempt status solely because it found that the Petitioner did not qualify as a common carrier because he hauled for predominantly one customer.

The Petitioner then timely filed a Petition for Review with the Commonwealth Court of Pennsylvania. At an evidentiary hearing before the Commonwealth Court, in January, 1991 after approximately ten and one-half years of litigation, the Commonwealth of Pennsylvania admitted that "... nothing in the definitional section requires that a common carrier perform for any particular number of customers", thereby sustaining the Petitioner's contention that he owed no tax because he qualified for an exemption as a common carrier.

The Commonwealth Court, however, allowed the Commonwealth to change its theory of litigation, abandoning the "one customer" approach and adopting a completely new theory that the Petitioner owed tax because

he did not hold a PUC license and had poor records; the Commonwealth Court gave the Petitioner only twenty days to respond to an entirely new theory. On August 9, 1991, the Commonwealth Court affirmed the decision of the Board of Finance and Review. Fiore v. Commonwealth of Pennsylvania, 596 A.2d 1147 (Pa. Cmwlth. 1991).

The Petitioner then appealed to the Pennsylvania Supreme Court on a number of grounds, one of which was that he was denied procedural due process. The Court vacated the Commonwealth Court's decision and remanded the case for a new hearing. Fiore v. Commonwealth of Pennsylvania, 633 A.2d 1111 (Pa. 1993). The Court held that giving the Petitioner only twenty days to prepare for trial after the Commonwealth changed its position of ten and one-half years, was a violation of procedural due process and ordered a new hearing in the Commonwealth Court. However, the Supreme Court of Pennsylvania rejected the Petitioner's contention that his appeal should

be sustained and the assessments in excess of One Million Dollars should be dismissed.

On remand to the Commonwealth Court, the Court conducted an evidentiary procedure. Petitioner, by then an incarcerated person in Pennsylvania, represented himself pro se. At this hearing the Court violated Petitioner's procedural due process rights by its failure to afford Petitioner access to his files; the Court compounded its error when it failed to create a clear, complete, and permanent record of those proceedings. In particular, while Petitioner, acting pro se, presented several boxes of his business documents to be made part of the record, the Court never had those documents identified and docketed, or ruled on their admissibility. The Commonwealth Court again affirmed the decision of the Board of Finance and Review. Fiore v. Commonwealth of Pennsylvania, 668 A.2d 1210 (Pa. Cmwlth. 1995). The Petitioner filed an appeal from this decision to the Pennsylvania Supreme

Court, asserting that he had been deprived of procedural due process, and that he was blocked from presenting his case due to that court's refusal to be clear about which documents it would admit and the resultant amorphous record. Pennsylvania Supreme Court denied the appeal and affirmed the Commonwealth Court's decision on March 25, 1997. A Petition for Reargument was timely filed, but was denied on May 9, 1997. This Petition seeks review of that decision.

Petitioner raised the first issue, whether due process was violated when Respondent asserted new theories of liability, in his brief on appeal at William M. Fiore t/a Fiore Trucking and Contracting v. Com. of Pa., No. 50.51 and 52 M.D. Appeal Docket 1992, at pages 22-28 and 45-49. The Supreme Court did not directly address this claim in its Opinion (App. 73).

Petitioner raised the second and third issues, that he was denied due process in being denied adequate access to

his records prior to the remand hearing and that the Commonwealth Court denied him the opportunity to put evidence into the record, in his brief to the Pennsylvania Supreme Court in William M. Fiore t/a/ Fiore Trucking and Contracting v. Com. of Pa., Nos. 83, 84 and 85 M.D. Appeal Docket 1996. The Supreme Court of Pennsylvania affirmed the Commonwealth Court's decision without opinion. (App. at 143).

DISCUSSION

The guarantees of due process are specifically set the Fifth and Fourteenth Amendments to the Constitution, and provide that no person shall be "... deprived of life, liberty or property, without due process of law." U.S. CONST. amend. V, XIV. The history of Due Process shows that it has long been equated with a fair trial and a "feeling of just treatment." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162, 71 S.Ct. 624 (1951) (Frankfurter, J. concurring). The facts surrounding

the petitioner's case require this Court to question whether the decisions of the appellate courts of Pennsylvania afforded justice and fundamental fairness to Petitioner Fiore.

I. Petitioner's due process rights were violated when the Commonwealth of Pennsylvania revised its theory of liability after 10 1/2 years of litigation

Procedural due process requires adequate notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 902 (1976); Boddie v. Connecticut, 401 U.S. 371, 378, 91 S.Ct. 780, 786 (1971) (quoting Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191 (1965)). Further, "a purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivation of a protected interest." Carey v. Piphus, 435 U.S. 247, 261-262, 98

S.Ct. 1042, 1050 (1978). The phrase "due process of law" implies that a person will receive fair treatment and a procedure designed to achieve a just result. Petitioner's case raises more than a question as to justice and unfair deprivation of a protected interest.

For ten-and-a-half years, Petitioner defended himself against the Respondent Commonwealth's single theory of tax fraud. Respondent maintained that Petitioner did not qualify as a tax-exempt common carrier because it served only one customer. Then, after Petitioner had exhausted all administrative procedures including administrative appeals, and created the factual record necessary to respond to the Respondent's single theory on appeal to the Commonwealth Court, the Respondent shifted theories. For over ten years, Petitioner had tailored his evidentiary gathering and maintenance to the Respondent's theory, only to have it changed at the proverbial eleventh hour. Such conduct by the Respondent, as condoned by

the courts of Pennsylvania, violated all principles of fundamental fairness and due process.

A. The Commonwealth of Pennsylvania admitted the validity of the petitioner's defense

In its proceedings against the petitioner, Respondent repeatedly professed one claim as the basis of the Petitioner's liability. That claim rested on the Respondent's assertion that Petitioner was not a tax exempt common carrier because he hauled for predominantly one customer. Throughout a decade of administrative proceedings, Petitioner maintained as his defense that he qualified for an exemption as a common carrier, despite hauling for primarily one customer. Throughout the first ten years of this litigation, Respondent stood by its theory of the Petitioner's liability.

The only basis for the Commonwealth of Pennsylvania, Department of Revenue Appeals Board's

decision, upholding Plaintiff's liability was that Petitioner's defense was statutorily invalid. In its decision, the Board specifically stated that "... in those instances where a 'Class D' common carrier performs hauling services predominantly for a single customer, it is not entitled to claim the public utility exemption." In the subsequent appeal, the Department of Revenue Appeals Board again relied on the Commonwealth's theory of liability. The Board stated "... that in those instances where a common carrier performs hauling services predominantly for a single customer, he is not entitled to claim the public utility exemption."

Throughout this period of time, Petitioner consistently defended that hauling for primarily one customer did not disqualify him from the common carrier exemption.

In its Memorandum of Law to the Commonwealth Court on Petitioner's appeal, Respondent reversed its long-

held position and admitted that Petitioner was correct on this interpretation of the law. The Respondent stated that it "... agrees that nothing in the definitional section requires that a common carrier perform for any particular number of customers." In this brief statement, Respondent sustained petitioner's defense of ten years.

B. Pennsylvania law precludes changing theories of liability on appeal

The Pennsylvania Commonwealth Court violated petitioner's due process rights in allowing the case to continue after Respondent made this admission. After admitting the validity of the Petitioner's defense, Respondent proceeded to change liability theories at subsequent evidentiary hearings. The Commonwealth Court errantly permitted this, thereby violating the Petitioner's due process rights, thereby erasing a decade of defense and allowing Petitioner, by then incarcerated, to

endure a sudden and massive fiscal reversal at the whim of the state.

Chapter 15 of the Pennsylvania Rules of Appellate Procedure sets forth guidelines for judicial review of governmental agency determinations.

Pennsylvania Rule of Appellate Procedure 1551(a) speaks to the scope of review of quasi-judicial orders. It provides, in part: "No question shall be heard or considered by the [Commonwealth] court which was not raised before the government unit."[1] Rule 1571(h), which deals specifically with Commonwealth Court review of Board of Finance & Revenue decisions, also limits the scope of review to questions which were raised and preserved in the administrative process, with certain exceptions not relevant here. Pa. R.A.P. 1571(h).

---

[1]Both Pa.R.A.P. 1551(a) and 1571(h) provides for exceptions to the limited scope of review, none of which are relevant here.

Due diligence, and these Rules, require the Commonwealth to include all allegations and theories of liability during the administrative proceedings against a taxpayer. Its failure to do so violates both the Rules, Pennsylvania case law, and the theory of fundamental fairness by government and implicates due process. As the Pennsylvania Supreme Court stated in DeMarco v. Jones & Laughlin Steel Corp., 522 A.2d 26 (Pa. 1987), legal issues and facts not presented to the referee during the administrative process (a workers' compensation claim) cannot be asserted on appeal without sacrificing the integrity of the administrative scheme. Likewise, in Kindle v. Commonwealth State Board of Nurse Examiners, 515 A.2d 1342 (Pa. 1986), the Court recognized that, in general, the failure to raise a certain defense during the administrative process precluded its consideration on appeal. The recognized exception to this rule is where such questions could not, by the exercise of due diligence,

have been raised before the agency. See, Gateway School Dist. v. Com. Dept. of Educ., 559 A.2d 118 (Pa.Cmwlth. 1989).

Similarly, in Kimmel v. Somerset County Commissioners, 333 A.2d 777 (Pa. 1975), the Court stated, "It is a fundamental principle of appellate review that we will not reverse a judgment or decree on a theory that was not presented to the trial court." See, Altman v. Ryan, 257 A.2d 583, 585 (Pa. 1969). Respondent should have been precluded by the Commonwealth Court from raising and asserting these new theories of liability at that point in the proceedings.

As a result of Rules 1551 and 1571 and the preclusion traditions of Pennsylvania case law, the Commonwealth Court erred in permitting Respondent to introduce new theories in the appellate and subsequent proceedings. The Commonwealth Court should have found for the Petitioner as Respondent had presented no

other theories upon which to base its case during the administrative process. Instead the Court erroneously permitted Respondent to charge its posture to include two additional liability theories that never had been addressed at prior administrative proceedings. The Commonwealth Court then gave Petitioner an inadequate amount of time to respond to the Respondent's new avenues. On appeal, the Supreme Court of Pennsylvania compounded this error in remanding the action for further proceedings, rather than dismissing the charges against Petitioner.

C. Due process would bar further action by the state

The concept of due process is elastic and flexible, and must be adapted to countless different contexts.

> "[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American

> constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, reason, and past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

Joint Anti-Fascist Refugee Committee v. McGarth, 341 U.S. at 162-63 (Frankfurter, J., concurring).

Likewise here, Petitioner's due process claim does not fit within an easily defined construct of due process analysis. It is necessary for the Court to consider the overall dominant constitutional paradigm that no governmental action is permitted to interfere with property and liberty without due process, best understood as fundamental fairness.

Petitioner's due process analysis herein is akin to

the concept of res judicata.

The doctrine of res judicata states that "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 398, 101 S.Ct. 2424 (1981) (citations omitted).

After Respondent admitted that Petitioner was not liable for tax evasion under the theory it had pressed for over ten years, through the completion of the administrative process, the Pennsylvania Courts should have precluded Respondent from continuing to press its claim, and from victimizing Petitioner. Respondent's admission, on appeal, that Petitioner was not liable under the only theory of liability that it had presented, should have resulted in a quick reversal of the Appeals Board's decision. By allowing Respondent to alter its theory of liability, the Commonwealth Court essentially gave

Respondent carte blanch to relitigate the issues of the petitioner's liability. However, the liability issue already had been decided when Respondent admitted to the validity of the petitioner's defense, thereby precluding further action. The Commonwealth Court and later the Pennsylvania Supreme Court, violated the petitioner's rights by permitting Respondent to change theories of liability at the appeal stage.

Respondent submitted new theories that the Petitioner did not hold a PUC license, and that his records were not maintained in a proper fashion. At no time in the proceedings of ten years, did Respondent state these claims. Respondent's "new theories" were not supported by any evidence of record. In fact, Petitioner had held a PUC license since the 1950's. Further, the narratives of both audit reports of Petitioner's business made no suggestions of liability on the basis of poor record keeping.

In essence, Respondent had never before submitted into the record any evidence on which to base these new theories. In the original action by the Pennsylvania Department of Revenue, and the subsequent appeal to the Board of Appeals, there is no mention of these theories. In both decisions by the Board of Appeals, the sole basis for determining liability rests on the "one customer" theory advanced by Responded. Such judicial conduct was and is conducive to unbridled state power.

The Commonwealth Court and the Pennsylvania Supreme Court erred in permitting Respondent to advance new theories that should have been barred by the doctrine of res judicata, and fundamental fairness. Such judicial conduct was and is conducive to unbridled state power.

In Mathews v. Eldridge, this Court stated that the "essence of due process is the requirement that a 'person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." 424 U.S. at 349

(quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. at 171-172 (Frankfurter, J., concurring)). Surely, this Court did not envision due process to allow for the Commonwealth of Pennsylvania to adopt new theories ten years into the appeals process and in the face of contrary Pennsylvania law. To allow such action would be violative of the simple and fair justice that due process provides. Zinermon v. Burch, 494 U.S. 113, 125, 110 S.Ct. 975 (1990). Petitioner requests this Court dismiss the assessment against him on the grounds that the Pennsylvania appellate courts erred in permitting the Commonwealth of Pennsylvania to change its claims of liability after admitting to the validity of the petitioner's defense.

II. Petitioner was denied Due Process when the Commonwealth Court failed to afford him adequate access to his records on remand

III. Petitioner was denied due process when the Commonwealth Court failed to create a record of documents proffered by Petitioner

Subsequent to Respondent's change in theory, the Commonwealth Court gave Plaintiff only twenty days to prepare for an evidentiary hearing on the new theories. On appeal from the Commonwealth Court's affirmance of the Board of Review's decision, the Superior Court of Pennsylvania ruled that the Commonwealth Court's procedure denied Petitioner due process.

The Pennsylvania Supreme Court specifically addressed this issue, stating:

> During the ten years following the first audit, there had never been any contention that Fiore was not a common carrier, was guilty of poor record keeping, or lacked a license or certification. When the Commonwealth Court determined that a common carrier may haul predominantly for one customer, the Commonwealth was permitted to adopt the latter arguments--after discovery and a mere twenty days before the evidentiary hearing in the Commonwealth Court."

Fiore v. Com. Bd. of Fin. and Rev., 633 A.2d 1112, 1113

(Pa. 1993).

The Supreme Court remanded Petitioner's case for "a new hearing at which Fiore will be given the opportunity to prove his entitlement to exemption from the sales and use tax, after receiving sufficient notice to search his records and prepare documentation of his claimed entitlement." Id. at 1115.

On remand, the Commonwealth Court again denied Petitioner, who was then incarcerated on other charges, an adequate opportunity to review and organize his documents. The Court compounded its error when it failed to accept documents proffered by Petitioner during the hearing and make them a part of the record.

While there is a reluctance to define due process for fear that the definition may be interpreted in a way that would limit or restrict its application in a particular case, there are several well-recognized elements of a fair hearing, as set forth by Judge Henry Friendly of the

United States Court of Appeals for the Second Circuit.

These include:

1. An unbiased tribunal;
2. Notice and grounds for the proposed action;
3. An opportunity to show why the proposed action should not be taken;
4. The right to call witnesses;
5. The right to know opposing evidence;
6. The right to have the decision based only on the evidence presented;
7. The opportunity to be represented by counsel;
8. **A record of the proceeding**;
9. A statement of reasons;
10. Public attendance; and
11. Availability of judicial review.

Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1279-1295 (1975) (emphasis added).

The right to a preserved record, and access thereto, has long been recognized by this Court. For example, in Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585 (1956), this Court held that due process and equal protection mandate that the State must provide an indigent defendant with a copy of his or her trial transcript. The Court recognized

that denial of a transcript, or its equivalent, would effectively preclude a defendant's access to the appellate process. Similarly, in Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999 (1970), this Court ruled that a preliminary hearing is a critical stage to which every defendant is entitled to counsel. The Court's rationale was based, in part, on the fact that the record produced at the preliminary hearing was deficient in that it did not reflect important facts. Had the defendant had counsel, the Court reasoned, such deficiency in the record may not have occurred.

This Court has perceived the essential due process requirement of the creation of a full and complete record in the civil context, also. In Alexander v. Gardner-Denver Co., 415 U.S. 36, 58-59, 94 S.Ct. 1011, 1024 (1974), this Court set forth basic, due process elements of a judicial proceeding which differentiate it from arbitration, including: the creation of a complete record, application

of rules of evidence, rights to full discovery, compulsory process, cross-examination and testimony under oath. In Alexander, this Court ruled that employment arbitration agreements could not supplant an employee's right to full statutory review under Title VII of the Civil Rights Act of 1964. Nor should a federal court defer to the findings and conclusions of the arbitrators because arbitration proceedings did not afford the full panoply of process necessary to create a complete record on review.

The function of notice under due process "is to apprise an affected individual of, and permit adequate preparation for, an impending hearing" which may affect their legally protected interests. Memphis Light, Gas, & Water Division v. Craft, 436 U.S. 1, 14, 98 S.Ct. 1554 (1978). Notice is meaningless unless it affords one the time and possibility to "adequately prepare" for a hearing.

Obviously, the Commonwealth Court's failure to afford Petitioner access to his records and its refusal to

create an evidentiary record during the hearing does not comport with these fundamental elements of due process. The hearing that occurred affords no confidence that Petitioner's documentary evidence was considered, or that it was anything but a show and sham designed to allow the smooth separation of Petitioner from his earnings.

Petitioner was given no more time to prepare his defense, even though time did elapse between the hearings, because he was incarcerated. Petitioner proceeded pro se during the second evidentiary hearing: thus, this access was vital.

Not only did the Commonwealth Court breach constitutional principals of due process, but also failed to follow its own statutory mandate. Pursuant to 42 Pa.Con.Stat. § 564, that Court's obligation at a hearing was to "receive the evidence" that the Commonwealth Court failed to do. In Pennsylvania State Police, Bureau of Liquor Enforcement v. Kelly's Bar, Inc., 639 A.2d 440

(Pa. 1994), the Supreme Court of Pennsylvania recognized that the lower court, on review of an administrative agency decision, had a "duty" to receive into the record any evidence proffered by a party. Id. at 442. Petitioner here asked that his documents be made a part of the record, which the Commonwealth Court failed to do.

CONCLUSION

This Court has further stated that "due process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593 (1972). In denying the petitioner access to his records to adequately prepare his defense, the Commonwealth Court was callous to the special circumstances surrounding the petitioner; namely, that the petitioner, appearing pro se, was incarcerated at the time of trial. As a result of this incarceration, the petitioner was unable to access the records in order to

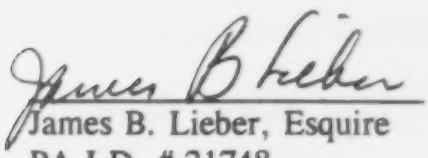
prepare his defense to the new liability theories.

In addition, the Commonwealth Court should have considered that the Commonwealth of Pennsylvania changed liability theories ten years into the litigation. These circumstances surrounding the petitioner's case required the Commonwealth Court to be more flexible in providing procedural protection. The Commonwealth Court should have provided or insured the petitioner greater access to his records.

Finally, because Petitioner proceeded pro se, the Commonwealth Court should have assisted him insofar as ensuring that the records he presented during that hearing were made a part of the record; it did not do so. Such failure clearly violates due process dictates which require the creation of a record as a fundamental element of due process.

Respectfully submitted,

LIEBER & HAMMER, P.C.



James B. Lieber, Esquire
PA I.D. # 21748
Lieber & Hammer, P.C.
5528 Walnut Street
Pittsburgh, PA 15232-2312
(412) 687-2231

Counsel of Record
for Petitioner